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No. 07-907

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IN THE

Supreme Court of the United States

KENNETH W. JOHNSON,

Petitioner,

v.

JESSE GADSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TONY S. LEE AND McGUIREWOODS LLP

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in affirming the dismissal of Petitioner's Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), when his pleading did not state a claim of racial discrimination for which relief can be granted under 42 U.S.C. § 1981, and Petitioner pled detailed facts showing that no racial discrimination had occurred?

2. Whether the court of appeals erred in affirming the dismissal of Petitioner's Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), when his pleading did not state any equal protection claim for which relief can be granted, and Petitioner pled detailed facts below showing that no denial of equal protection had occurred?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit, were Plaintiff-Appellant Kenneth W. Johnson ("Petitioner"), and Defendants-Appellees Jesse Gadson, Tony S. Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, and McGuireWoods LLP.

Stacey Lewis and Robert Mance were defendants in the district court proceedings. The district court dismissed them by Order dated July 10, 2006 for lack of service, and they are not parties to Petitioner's appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent McGuireWoods LLP states that it is a private law firm. It does not have any parent corporation, and no publicly held corporation owns a 10% or greater interest in it.

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This is a Brief in Opposition to a Petition for Writ of Certiorari from an unreported per curiam decision entered on October 9, 2007, which affirmed the dismissal of Kenneth W. Johnson's ("Petitioner's") Complaint for failure to state any claim upon which relief can be granted. The text of this unreported per curiam decision is reproduced at pages 1-2 of the Appendix to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

On October 16, 2007, Petitioner filed his Petition for Rehearing Pursuant to FRAP 40 in the United States Court of Appeals for the District of Columbia Circuit. He filed his Petition for Rehearing En Banc in that court on November 6, 2007.

These petitions remained pending in the D.C. Circuit when Petitioner filed his Petition for Writ of Certiorari on December 26, 2007 (docketed on January 9, 2008), and his "January 16, 2008" Corrected Petition for Writ of Certiorari (undocketed), in this Court. (See Corrected Pet. at 1.)

The court of appeals denied Petitioner's petition for rehearing en banc by Order dated January 23, 2008. That same day, it also denied his petition for panel rehearing, as well as his motion for appointment of counsel, deeming such appointment unwarranted because Petitioner did not show a "sufficient likelihood of success on the merits" of his case.

RELEVANT STATUTES INVOLVED IN THE CASE

Petitioner cites 42 U.S.C. § 1981, which is accurately reproduced on page 2 of his Corrected Petition.

Although the second question presented by Petitioner references an alleged denial of equal protection, Petitioner did not formally plead any constitutional count below.

By Order dated March 8, 2007, the court of appeals summarily affirmed the dismissal of Petitioner's claim under 42 U.S.C. § 1983. Petitioner did not appeal that decision.

COUNTERSTATEMENT OF THE CASE

Petitioner filed a 104-page Complaint, along with five volumes of accompanying exhibits, in the United States District Court for the District of Columbia on January 9, 2006. Petitioner alleged violations of his civil rights under 42 U.S.C. §§ 1981 and 1983, and he pled pendent state law claims for both legal malpractice and intentional infliction of emotional distress.

On February 10, 2006, Respondent Lee moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief could be granted. Respondents Gadson, Harmon, Condon, and Shore also filed similar motions.

On May 30, 2006, the district court granted Petitioner leave to amend his Complaint to add McGuireWoods LLP as an additional defendant. McGuireWoods LLP and Lee filed their motion to dismiss the 106-page Amended Complaint pursuant to Rule 12(b)(6) on July 10, 2006. That same day, the district court dismissed defendants Stacey Lewis and Robert Mance from the case, as Petitioner had never filed any proofs of service for them, and had not responded to a Show Cause Order requesting such evidence.

By Order dated September 19, 2006, the district court granted the Rule 12(b)(6) motions to dismiss. In an eleven-page memorandum opinion, the district court concluded that

Petitioner failed to state any claims upon which relief could be granted.

First, it observed that Petitioner's Section 1981 claim failed because his "allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981." (Mem. Op. at 7) (citations omitted). It also held that the facts pled by Petitioner showed that defendants had exercised their professional judgment when declining to represent him, and not engaged in any racial discrimination. (Id. at 7-8.)

Second, it concluded that Petitioner's Section 1983 claim failed because the facts as pled showed no deprivation of any right secured by federal law, and because defendants were not state officials (or acting in conjunction with state officials) when declining to represent him. (Mem. Op. at 9-10.)

Third, it refused to exercise pendent jurisdiction over Petitioner's state law claims, and dismissed them for lack of jurisdiction. (Id. at 10.)

On September 20, 2006, the district court amended its opinion to add a footnote regarding Petitioner's failure to plead diversity jurisdiction.

On September 27, 2006, Petitioner moved the district court to reconsider its decision. On October 2, 2006, he also moved it to vacate its ruling. By Memorandum Opinion and Order dated October 23, 2006, the district court denied these motions.

On November 3, 2006, Petitioner moved the district court to reconsider the denial of his motion to reconsider and

motion to vacate. The district court denied this motion by Order dated November 9, 2006.

Petitioner filed several notices of appeal to the United States Court of Appeals for the District of Columbia Circuit. Respondents moved the court of appeals to summarily affirm the district court's holdings, while Petitioner moved, in turn, for summary reversal. By unpublished per curiam Order dated March 8, 2007, a panel of the D.C. Circuit denied his motion. It also granted Respondents' motions for summary affirmance on Petitioner's Section 1983 claim, but denied them as to his Section 1981 and state law claims.

Following merits briefing on these remaining claims, the panel affirmed the dismissal of those claims by Judgment dated October 9, 2007. Petitioner filed his petitions for panel rehearing on October 16, 2007, and for rehearing en banc on November 6, 2007.

While these petitions were pending below, Petitioner filed a five-page Petition for Writ of Certiorari in this Court on December 26, 2007. He then filed a fourteen-page "January 16, 2008" Corrected Petition for Writ of Certiorari.

By Orders dated January 23, 2008, the D.C. Circuit denied Petitioner's request for panel rehearing, and rehearing en banc.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The district court's dismissal of Petitioner's case for failure to state any claim on which relief can be granted, and the court of appeals' affirmance of this dismissal, are logical and compelled by existing law. The Petition for Writ of Certiorari (and the Corrected Petition) do not assert that this affirmance creates any conflict with decisions from any other

courts of appeals, and indeed do not cite any decision from any sister circuit. Nor do they otherwise raise any unsettled question of federal law, or any conflict with prior decisions by this Court. Although one of Petitioner's questions alleges a conflict with three decisions by this Court, no such conflict exists.

The fact of the matter is that Petitioner – after given an opportunity to amend below – pled facts showing that the respondents did not discriminate against him, or violate his equal protection rights, due to his race. The record amply reveals that Respondents refused to represent him because his claims against the District of Columbia stemming from his 1997 arrest were either without merit, or time-barred. Thus, this Court should deny him a writ of certiorari.

I. Petitioner failed to state a cognizable Section 1981 claim.

Petitioner's detailed and extensive factual allegations confirm beyond all doubt that Respondents did not decline to represent him for race-related reasons. The 1,151 pages of exhibits accompanying his Complaint confirm beyond all dispute that Respondents did not represent him because of sound legal reasons having nothing to do with his race.

The record below reveals that Petitioner was arrested in 1997, and tried in the Superior Court for the District of Columbia, where he was subsequently acquitted. Petitioner sued the District in May 1998 over events stemming from his arrest, but his litigation was dismissed for failure to satisfy mandatory notice requirements set forth in the D.C. Code.

Importantly, Petitioner waited over five years before asking the Superior Court to reconsider its ruling based upon allegedly fraudulent statements that the District made when moving to dismiss his case. The D.C. Court of Appeals held

that Petitioner's motion was untimely, and that his case was properly dismissed in any event because he had not met the substantive requirements for showing fraud. Last year, his suit came to this Court, which correctly denied his Petition for Writ of Certiorari, Johnson v. Dist. of Columbia, 127 S. Ct. 1493 (2007), as it should similarly do here.

Petitioner then proceeded to bring federal lawsuits – first against the District, and then against attorneys he had contacted – seeking to recover damages that he believed he was owed from his failed original suit. All of these lawsuits have failed. The instant lawsuit, as it relates to Respondents Lee and McGuireWoods LLP, contends that they (like other Respondents) refused to represent him because of his race. However, the facts pled by Petitioner showed otherwise, and showed conclusively that Lee and McGuireWoods declined to represent Petitioner because his claims were meritless and time-barred because of actions that Petitioner took (or failed to take) long before he had ever contacted them. Simply put, the record objectively disproves any notion that "Johnson would not be in the circumstances that he's in now if attorneys had taken the appropriate action a long time ago." (Corrected Pet. at 8.)

Petitioner now argues to this Court that he was never required to plead all four of the prima facie elements for race discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). But whether that is so is irrelevant, as Petitioner went far beyond the boundaries of notice pleading, and actually pled himself out of court by flooding the record with facts contradicting his claims of racial discrimination. Thus, there is no conflict – actual or perceived – between the well-founded affirmance below, and this Court's decisions in Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002), or McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

The record plainly confirms that Respondents refused to represent Petitioner because his claims against the District were meritless and/or time-barred for reasons having nothing to do with Respondents. This rendered Petitioner's Section 1981 claim ripe for dismissal under Rule 12(b)(6). Because multiple courts have reviewed this detailed record, and held that Petitioner failed to state any claim on which relief can be granted, this Court should refuse to grant him a writ.

II. Petitioner also does not raise any cognizable Equal Protection claim.

Petitioner's equal protection claim, not formally pled in the district court as a count in the Amended Complaint, similarly fails to state any cause of action. Petitioner cites Foman v. Davis, 371 U.S. 178, 182 (1962), to assert that he should have been granted further leave to amend following the dismissal of his Amended Complaint. But the quotation on pages 11-12 of his Corrected Petition appears nowhere in Foman, which, in any event, is unhelpful to him. In Foman, this Court stated that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." 371 U.S. at 182 (emphasis added). But that obviously is not the case here.

As the record shows, the facts and circumstances pled by Petitioner demonstrate that his equal protection claim (to the extent pled), like his Section 1981 claim, is not a proper subject of relief. Petitioner is not entitled to discovery on his defective claims. Because Petitioner failed to state any claim of racial discrimination for which relief can be granted under Section 1981, there is no basis for allowing him discovery on his allegations – especially when he pled facts unequivocally demonstrating that no racial discrimination, or denial of equal protection, had occurred.

In short, there is no conflict between the affirmance below and Foman. As this Court has noted, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10. This case presents no reason to depart from this sound rule.

CONCLUSION

This matter presents no viable issue for this Court to consider. Petitioner pled facts showing that Respondents had not racially discriminated against him, and compelling the dismissal of his Amended Complaint under Rule 12(b)(6). For the foregoing reasons, and the additional reasons stated in the record, Respondents Tony S. Lee and McGuireWoods LLP respectfully request that this Court deny the Petition and Corrected Petition for Writ of Certiorari.

Respectfully submitted:

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